92-2040

Supreme Court, U.S.
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CASE NO.

in the Supreme Court of the United States

October Term, 1992

ORLANDO HERNANDEZ-OVIEDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH JUDICIAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Government can be compelled to make a §5K1.1 motion for downward departure from the United States Sentencing Guidelines, where the Government had no unconstitutional motive for failing to make the motion , but where the Government promised in a plea agreement to make the motion.

2. Where a defendant can gain a reduction in sentence from cooperating in the Government's investigation of crimes, and promises in a plea agreement to give such cooperation, whether the Government has a contractual duty to attempt the investigation so as to make possible the defendant's cooperation.

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ORDER BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed per curiam the Petitioner's sentence, holding that the district court could only review the Government's failure to file a §5K1.1 motion where the Government had an unconstitutional motive for failing to make the motion, and further holding that the district court did not err in holding that the Government did not act in bad faith in failing to move under §5K1.1. The opinion of the Eleventh Circuit, which has not been published, is reprinted in the appendix.

JURISDICTION

This Petition arises from a criminal indictment filed against HERNANDEZ in the District Court for the Southern District of Alabama. The indictment charged HERNANDEZ with violating 18 U.S.C. §2, 21 U.S.C. §841(a)(1), and 21 U.S.C. §846.

HERNANDEZ pleaded guilty to violating 21 U.S.C. §846, and was sentenced to prison for 324 months. He appealed the sentence to the United States Court of Appeals for the Eleventh Circuit, pursuant to 28 U.S.C. §1291.

On March 29, 1993, the Court of Appeals for the Eleventh Circuit issued an opinion affirming HERNANDEZ's sentence. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1254.

RELEVANT STATUTE

Federal Sentencing Guidelines §5K1.1.

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger of risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Orlando Hernandez-Oviedo ("HERNANDEZ"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

STATEMENT OF THE CASE

In 1987 and 1988, HERNANDEZ participated in the trafficking of cocaine from Miami to Baldwin County, Alabama, from where others distributed the cocaine to Detroit, New Orleans, Pensacola and Mobile. On April 26, 1991, the Federal Grand Jury, Southern District of Alabama, indicted HERNANDEZ pursuant to 18 U.S.C. §2, 21 U.S.C. §841(a)(1), and 21 U.S.C. §846, for participating in the conspiracy to possess and distribute cocaine.

On December 12, 1991, HERNANDEZ entered into a Plea Agreement ("Agreement") with the Government, reprinted in the appendix. HERNANDEZ agreed "to cooperate fully with law enforcement agents investigating federal law violations, said cooperation to include providing a full, complete and truthful statement regarding his knowledge of such activity, and testifying fully and truthfully if called as a witness before the grand jury or in any trial which might result from his cooperation." In return for this cooperation, "if the cooperation amounts to substantial assistance in the investigation or prosecution of another person who has committed a felony offense, upon completion of said cooperation, the United States will move the sentencing court to depart downward from the low end of the sentencing guidelines sentence."

Unlike many plea agreements, the Agreement did not leave to the Government the determination of whether HERNANDEZ provided substantial assistance. Instead, HERNANDEZ's "assistance will be evaluated by the Court and any appropriate reduction will be determined by the Court for reasons that include, but are not limited to, significance and usefulness of the assistance, the truthfulness, completeness and reliability of his assistance, the nature and extent of his assistance and the riskiness of the Defendant's assistance."

Pursuant to the Agreement, HERNANDEZ provided the Government with extensive and detailed information on others' criminal activities. The Government conducted no investigation into this information, as Federal Bureau of Investigation ("FBI") agent Clay Poche ("Poche") testified as HERNANDEZ's April 3, 1992 sentencing hearing. For instance, HERNANDEZ told the Government that Ivan Gonzalez-Line had murdered a Dr. Vidal in Mexico in 1981, had engaged in espionage for the Cuban government in the United States, and had smuggled sensitive technology including computers to Cuba from the United States. Poche knew of no steps taken by the Government to investigate any of these charges.

HERNANDEZ further informed the Government that a man nicknamed "Mayito," at a specified address in Miami, sold cocaine. The Government conducted no investigation of this charge, not even asking Hernandez to phone Mayito to see if Hernandez could purchase more cocaine, a tactic which Poche admitted was typically used by the FBI and Drug Enforcement Administration ("DEA").

HERNANDEZ also told the Government that Alfredo Berland was heavily involved in cocaine trafficking, and had kidnapped and murdered another drug trafficker. The

Government conducted no investigation to follow up on this information.

In addition, HERNANDEZ informed the Government that Martin Fuentes had routinely bribed Immigration Supervisor William Riley to get people released from immigration detention, and that Fuentes had murdered his wife's lover. The Government took no steps to investigate these charges of official corruption and murder.

HERNANDEZ was at first reluctant to openly and completely provide information to the Government. But then, at great personal risk, he implicated himself and others in criminal wrongdoing. To confirm the veracity of his information, he took and passed a polygraph examination with a bilingual examiner who was a former DEA employee. But because persons whom HERNANDEZ incriminated, and other individuals whom the Government refused to identify, gave information that differed from HERNANDEZ's information, the Government decided without attempting any investigation of HERNANDEZ's information not to believe HERNANDEZ.

HERNANDEZ was sentenced on April 3, 1992. At the sentencing hearing, the court addressed HERNANDEZ's Sealed Motion for Specific Performance of Plea Agreement, which requested the Court to order the Government to honor its Agreement by making a motion under §5K1.1 of the Federal Sentencing Guidelines in return for the cooperation that HERNANDEZ had provided the Government.

The court ruled that it had no power to require the Government to move for a downward departure. The court also ruled that the Government had not acted in bad faith in determining that a §5K1.1 motion was unwarranted, despite the fact that the Plea Agreement provided that not the

Government but instead the court would determine whether HERNANDEZ had provided substantial assistance warranting a §5K1.1 motion. The court further failed to enforce a contractual duty by the Government to investigate any of the information provided by HERNANDEZ. Without the benefit of any corroboration of HERNANDEZ's information that might have come from some attempt by the Government to investigate the information, the court ruled that HERNANDEZ had breached the Agreement by providing untruthful information to the Government. The Court then sentenced Hernandez to 324 months of imprisonment.

REASONS FOR GRANTING THE WRIT

This Court should grant this Petition because, as demonstrated below, the Eleventh Circuit Court of Appeals has rendered a decision on an important question of federal law that is in conflict with decisions of this Court and the Second Circuit Court of Appeals. Moreover, the Eleventh Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The Petitioner submits the following argument in support of his Petition.

I. Contrary to rulings of this Court and the Second Circuit Court of Appeals, the Eleventh Circuit erroneously held that, where the Government has promised in a plea agreement to move pursuant to §5K1.1 of the United States Sentencing Guidelines, the Government may be held to its promise only where the Government has an unconstitutional motive for failing to make the motion.

The Eleventh Circuit in the instant case misconstrued the plain language of this Court in *Wade v. United States*, ___ U.S. ___, 112 S.Ct. 1840, 118 L.Ed.2d 524 (1992). In

Wade, the defendant was arrested on drug charges, and gave law enforcement officials information that led to the arrest of another drug dealer. The district court refused to reduce Wade's sentence below that provided in the United States Sentencing Guidelines, holding that §5K1.1 of the Sentencing Guidelines empowers district courts to make such a reduction only if the Government files a motion requesting the departure.

Both the court of appeals and this Court affirmed, this Court holding:

> federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive. Thus, a defendant would be entitled to relief if a prosecutor failed to file a substantial assistance motion, say, because of the defendant's race or religion.

___ U.S. at ___, 112 S.Ct. at 1843-44, 118 L.Ed.2d at 531. This Court added that "Wade would be entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end." *Id.*

But this Court made clear that this requirement of an unconstitutional motive or lack of a rational relationship to a legitimate Government end does not apply where the Government has promised in a plea agreement to make a §5K1.1 motion. Wade "does not claim . . . that the condition is superseded in this case by any agreement on the Government's behalf to file a substantial-assistance motion, *cf. Santobello v. New York*, 404 U.S. 257, 262-63, 92 S.Ct. 495, 498-99, 30 L.Ed.2d 427 (1971) . . ." ___ U.S. at ___, 112 S.Ct. at 1843, 118 L.Ed.2d at 530-31.

Ignoring this explicit language, the Eleventh Circuit below held that an unconstitutional motive was required before the Government could be compelled to move under §5K1.1, even though in the instant case the Government promised in a plea agreement that it would move under §5K1.1 in return for HERNANDEZ's cooperation. The Eleventh Circuit stated:

> Under the guidelines, a court may depart downward if the government moves for a departure pursuant to U.S.S.G. §5k1.1, although the 'district courts have authority to review a prosecutor's refusal to file such a motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive.' *Wade v. U.S.*, ____ U.S.____, 112 S.Ct. 1840, 1843-44, 118 L.Ed.2d 524 (1992). Here, there was no allegation that the government had an unconstitutional motive.

In contrast to the Eleventh Circuit in the instant case, the Second Circuit Court of Appeals has applied the plain statement of this Court in *Wade* that no constitutional motive is required to compel the Government to make a §5K1.1 motion, where the Government has promised in its plea agreement to make such a motion. In *United States v. Knights,* 968 F.2d 1483 (2d Cir. 1992), Knights pleaded guilty to drug offenses and agreed to cooperate by testifying against one of his co-defendants. The plea agreement provided that the government would move for a downward departure from the Sentencing Guidelines under §5K1.1 if the prosecution, in its "sole and unfettered" discretion, was satisfied with Knights' cooperation. Knights testified, but the Government refused to move for a downward departure. The district court found that the Government had acted in good faith in refusing to move for a downward departure.

In remanding to the district court for further consideration, the Second Circuit held that the *Wade* requirement of an unconstitutional motive does not apply where a plea agreement is involved. The Second Circuit quoted this Court's requirement of an unconstitutional motive, *id.* at 1486, then stated:

> Significantly, however, the defendant in *Wade* cooperated 'without the benefit of a plea agreement,' *United States v. Wade,* 936 F.2d 169, 170 (4th Cir. 1991), *aff'd,* ___ U.S. ___, 112 S.Ct. 1840, 118 L.Ed.2d 524 (1992), and he never argued at sentencing that the requirement for the government's motion was 'superseded in this case by any agreement on the Government's behalf to file a substantial assistance motion.' *Wade* 112 S.Ct. at 1843 (citing *Santobello v. New York,* 404 U.S. 257, 262-63, 92 S.Ct. 495, 498-99, 30 L.Ed.2d 427 (1971). With Knights, of course, there was an agreement, and we may review it, as *Wade* recognizes, to see if the government has lived up to its end of the bargain.

Id.

II. Where HERNANDEZ could gain a reduction in sentence from cooperating in the Government's investigation of crimes, and promised in his Plea Agreement to give such cooperation, the Government had a contractual duty to attempt the investigation.

The Government made a commitment to HERNANDEZ through the Plea Agreement to attempt some investigation of the information he provided, a commitment which must be upheld. In *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), this

Court affirmed that the Government must uphold its end of plea agreements.

In *Santobello,* the defendant entered into a plea agreement whereby he promised to plead guilty to a lesser charge than the one originally brought, and the prosecutor agreed to make no recommendation as to the sentence. At the sentencing, another prosecutor, unaware of the first prosecutor's promise, recommended the maximum sentence. This Court vacated the defendant's sentence, holding that "when a plea rests in any significant degree on a promise of agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262, 92 S.Ct. at 499, 30 L.Ed.2d at 433.

Regardless of whether the Government acts in good faith or in bad faith in breaching a plea agreement, this Court explained in *Santobello* that the Government must be held to its promise: "It is now conceded that the promise to abstain from a recommendation was made, and at this stage the prosecution is not in a good position to argue that its inadvertent breach of agreement is immaterial . . . That the breach of agreement was inadvertent does not lessen its impact." *Accord Mabry v. Johnson,* 467 U.S. 504, 510 n.12, 104 S.Ct. 2543, 2548 n.12, 81 L.Ed.2d 437, 445 n.12 (1984). The enforcement of plea agreements is particularly important in light of the fact that the overwhelming majority of federal criminal defendants resolve their cases by plea agreements. *United States v. Faulkner,* 952 F.2d 1066, 1070 (9th Cir. 1991); *United States v. Berrios,* 869 F.2d 25, 30 (2d Cir. 1989).

Had the Government attempted an investigation of the information HERNANDEZ provided, the district court would have been presented with sufficient information to make a knowledgeable determination as to whether HERNANDEZ had given truthful information and therefore

substantial assistance to the Government, which determination was expressly left to the district court and not the Government by HERNANDEZ's plea agreement. HERNANDEZ therefore could have had his sentence reduced.

The Government's obligation to investigate arises from its contract with HERNANDEZ, although the Government's duty under a plea agreement is of course not only contractual but also constitutional. *See, e.g., Innes v. Dalsheim,* 864 F.2d 974, 978, *cert. denied,* 493 U.S. 809, 110 S.Ct. 50, 107 L.Ed.2d 19 (1989) (2d Cir. 1988) (refusing to compare a criminal defendant to a "merchant in the marketplace"); *United States v. Harvey,* 791 F.2d 294, 300 (4th Cir. 1986) ("the defendant's underlying 'contract' right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law.").

Hernandez was obligated under the Plea Agreement to assist in the investigation or prosecution of others, which investigation or prosecution could not take place without cooperation by the Government by investigating HERNANDEZ's information. This Court has held:

> where the act to be done by one of the contracting parties can only be done upon something of a corresponding character being done by the opposite party, the law in such a case, if the contract is framed that it binds the party contracting to do the act, will imply a correlative obligation on the part of the other party to do what is necessary on his part to enable the party so contracting to accomplish his undertaking and fulfil his contract.

Hudson Canal Co. v. Pennsylvania Coal Co., 75 U.S. 276, 288-89 (1868). *Accord Citizens National Bank of Orlando v.*

Vitt, 367 F.2d 541, 545 (5th Cir. 1966) ("Whenever the cooperation of a promisee is necessary for the performance of a contract, there is an implied condition of the contract that the cooperation will be given."). In the instant case, the Government failed to make such investigation, ignoring HERNANDEZ's information about murder, espionage, narcotics violations and official corruption.

The Government could not simply walk away from its agreement with HERNANDEZ. In *United States v. Garcia,* 698 F.2d 31 (1st Cir. 1983), Garcia promised in a plea agreement to cooperate with the Government, in return for which the Government promised "that a recommendation to the Court at sentencing may include a recommendation of probation and a fine." *Id.* at 38. After Garcia gave his cooperation, the Government refused to make its promised recommendation, arguing that the Government only promised that it "may" make a recommendation and not that it would make such a recommendation. The First Circuit Court of Appeals rejected the Government's attempt to repudiate its bargain: "The Government will not be allowed to avoid the obligation it thus incurred by claiming now that the language literally promises nothing to the defendant." *Id.* at 38. *Accord Pacemaker Yacht Co. v. NLRB,* 663 F.2d 455, 459 (3rd Cir. 1981) (applying "the settled rule of contract interpretation that contract language should not be interpreted to render the contract promise illusory or meaningless.").

It is crucial that the Government be held to its promises in plea agreements, particularly in light of the vast power exercised by federal prosecutors since Congress's 1987 revision of the United States Sentencing Guidelines. By largely removing courts' discretion in sentencing defendants on particular charges, but leaving intact the Government's discretion in deciding which charges to bring, "Congress has in large part transferred the sentencing function from the

court to the prosecutor." *United States v. Martinez-Zayas,* 857 F.2d 122, 133 (3rd Cir. 1988). By adjusting the amount of drugs claimed to be involved in a criminal charge, or by adding additional offenses such as sale near a school, the Government can add years and even decades to a defendant's potential sentence. "The only way for the defendant to escape these lengthy minimum terms is to cooperate with the government in the hope that his assistance will be 'substantial' enough to make a motion for downward departure, *see id.,* §5K1.1 . . . " *United States v. Harrington,* 947 F.2d 956, 965 (D.C. Cir. 1991) (Edwards concurrence). When the Government is the only game in town, that game must be played fairly.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 22 day of June, 1993 upon:

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